International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers Local No. 27 (Daniel Construction Company) *and* **Paul Jones.** Case 14–CB–5436

16 August 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 26 March 1984 Administrative Law Judge Robert W. Leiner issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers Local No. 27, St. Louis, Missouri, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Delete the phrase "less statutory withholdings" from the recommended Order.

[1] We find merit in the General Counsel's exception to that portion of the recommended Order requiring the Respondent to deduct "statutory withholdings" from the backpay due Paul Jones. Because the payment of backpay by a labor organization is not treated as wages paid by or on an employer's behalf, we shall delete that provision from the recommended Order. *Meat Cutters Local 464 (Pathmark)*, 237 NLRB 16 (1978).

SUPPLEMENTAL DECISION

ROBERT W. LEINER, Administrative Law Judge. This backpay proceeding was heard in St. Louis, Missouri, on 11 January 1984, pursuant to a backpay specification and notice of hearing issued by the Acting Regional Director, Region 14, National Labor Relations Board on 31 August 1983. The Respondent, International Brotherhood of Boilermakers, Local No. 27, filed a timely answer in which it admitted and denied various allegations of the backpay specification. At the hearing, where the General Counsel amended the backpay specification and to which Respondent made adequate contrary pleadings, the parties were represented by counsel, afforded a full opportunity to be heard, file motions, amendments, and present evidence on the issues. The parties waived closing argument. On consideration of the entire record, including the General Counsel's posthearing brief, and on my observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. BACKGROUND; PLEADINGS

On 6 April 1983, the National Labor Relations Board issued its underlying Decision and Order (266 NLRB 602) concluding inter alia that International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers Local No. 27 (Respondent) violated Section 8(b)(1)(A) and (b)(2) of the National Labor Relations Act (the Act), in causing the layoff and preventing the promotion of the Charging Party, Paul Jones, in his employment by Daniel Construction Company at its construction site in Calloway, Missouri, and, inter alia, directing Respondent to make Paul Jones whole, with interest, for any loss of earnings resulting from these unfair labor practices.[1] Thereafter, Respondent and the General Counsel executed a stipulation providing, inter alia, for Respondent's waiver of its right to contest the propriety of the Board's Order and the findings of fact and conclusions of law underlying that Order. A controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Acting Regional Director issued the above backpay specification and notice of hearing to determine the amount of backpay due to Paul Jones.

The backpay specification, as amended at the hearing, provides for a backpay period running from July 9, 1981 (Respondent caused the layoff of Jones on July 8, 1981) through June 2, 1982, when, the General Counsel concedes, Jones took permanent "substantially equivalent" employment elsewhere (Tr. 11). Thus, involved are four calendar quarters during which the General Counsel alleges that backpay is due: the third quarter of 1981, the fourth quarter of 1981, the first quarter of 1982, and the second quarter of 1982. The amended backpay specification alleges, inter alia, that Jones' gross backpay is derived by multiplying the weekly average of all hours worked by boilermaker mechanics employed by Daniel Construction Company at the Calloway worksite (except those working 24 hours or less per week) by the boilermaker mechanics' hourly rate of pay adjusted to a straight time basis (by conversion of overtime hours at the rate of 1-1/2 times the straight time hours) and then multiplying the result by the number of weeks in the quarter in the backpay period.[2]

In addition, the backpay specification provides (Appendix C) for the payment to the appropriate Employer-Union trust fund trustees of the contractual pension fund

[1] Respondent's monetary obligation under the "make whole" remedy in the Board's Order terminates with either the employer's offer of reinstatement or the date Jones obtained "substantially equivalent employment."

[2] The backpay specification alleges, in addition to the four quarters of backpay, a period from March 30 through April 23, 1981, when Jones would have been an assistant foreman (at a higher rate of hourly pay than that of a boilermaker mechanic) but for the unlawful conduct of Respondent which prevented him from taking that assignment.

contributions on Jones' behalf which would have been paid into the pension fund had not Respondent caused Jones to be unlawfully laid off.

As a result of amendments and stipulations at the hearing, the gross backpay allegedly due to Jones (prior to his admittedly gaining substantially equivalent employment on and after June 3, 1982) is the sum of $26,533. Similarly, the amended amount alleged to cover the delinquent contributions to the pension trust fund which Respondent should have contributed on Jones' behalf is $2072.

Respondent, at the hearing, did not dispute the theory of using the particular boilermaker mechanics as an identifiable class on which to base the backpay, nor did it dispute the wage rates used by the General Counsel (from Daniel Construction's files) nor the average hours worked by the class of boilermaker mechanics during the backpay period. Thus, Respondent does not dispute the backpay specification's use of the particular arithmetical figures. Rather, Respondent, at the hearing, consistent with its answer, specified four areas in which it disputed the backpay specification or in which it would interpose defenses on which it had the burden: (1) the lack of good-faith attempts by Paul Jones to find interim employment, leading to the conclusion, which Respondent urges, that for long periods during the backpay period, Jones engaged in willful idleness; (2) Respondent denies the accuracy of the General Counsel's calculations in the computation of net wages from Jones' interim employment; (3) in particular, Respondent urges a termination date of the backpay period to be some time about March 23, 1982, when, it argues, Jones found ealier substantial equivalent employment, rather than on June 2, 1982, the date when, the General Counsel alleges, that substantial equivalent employment was found; and (4) Respondent argues that the backpay specification fails to take into account the effect of intermediate layoffs of other boilermaker mechanics at the jobsite during the backpay period and the diminution resulting therefrom on the alleged backpay.

II. THE MERITS OF RESPONDENT'S ARGUMENTS

With regard to (4), above, Respondent did not contradict the General Counsel's assertions that the record showed that Daniel's layoffs of other boilermaker mechanics during the backpay period did not follow seniority or other objective considerations; rather, they were based on a particular boilermaker mechanic's attendance record and overall ability. The General Counsel argues that since there is no objective basis to suggest that Jones would have been the subject of any intermediate layoff, there is no reason to include Jones in any intermediate layoff. Further, since the conclusion that he would have been laid off on an intermediate basis within the backpay period remains speculative, any ambiguity resulting therefrom must be laid at the feet of Respondent's unfair labor practices. Especially since Daniel evidently desired to promote Jones prior to Respondent's unlawful conduct, I agree with the General Counsel.

As noted in *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980):

> It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed [citations omitted] and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct. [Citation omitted.] Once that has been established, "the burden is upon the employer to establish facts which would . . . mitigate that liability."
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> Another well-established principle is that, where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer. *F. M. Broadcasting Corp. d/b/a WHLI Radio*, 233 NLRB 326, 329 (1977). In *United Aircraft Corp.*, 204 NLRB 1068 (1973), the Board stated that "the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved."

Applying the above principles to the instant facts, the General Counsel's backpay specification did not include, by way of diminution, any intermediate layoffs of boilermaker mechanics during the backpay period because there was no objective basis on which to conclude that Jones would have been one of boilermaker mechanics laid off. Respondent, in its turn, did not adduce any evidence to show that Jones would have been one of the employees (boilermaker mechanics) laid off during the backpay period. Once it is established that the formula in the backpay specification approximates what the discriminatee would have earned had he not been discriminated against and if it is established that the backpay formula is neither unreasonable nor arbitrary, then any uncertainty or ambiguity therein must be borne by the Respondent. *Kansas Refined Helium*, supra. As the court noted in *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977), a backpay award is only "an approximation" and if uncertainties and ambiguities are to be resolved against the wrongdoer and in favor of the wronged party, *F. M. Broadcasting Corp. d/b/a WHLI Radio*, supra, then Respondent must bear the burden of its failure to prove that Jones would have been laid off during the backpay period.

With regard to (1), above, the question of Jones' attempt to find intermediate employment and the question of any "willful idleness," the record shows that in the third quarter of 1981, which is the first quarter of the backpay period, Paul Jones having first telephoned Respondent's hiring hall and been told there were no jobs, engaged in self-employment. The self-employment took the form of his engaging in the business of transporting by bus Daniel employees from places as far as 85 miles from the Calloway, Missouri construction site to the construction site itself. In the period August through October 1981, Jones also looked for work in his long-established trade, painter, in various cities in Missouri (Rolla, St. James., Cuba, and St. Louis). He also visited the St.

Louis Painters Union office and the offices of various large St. Louis painting contractors. In so doing, he traveled no less than twice a week from his home in Cuba, Missouri, to St. Louis, a round-trip distance of approximately 168 miles. In the same period, he sought employment in automobile tire repair shops, gasoline service stations, and shoe manufacturers in St. James, Sullivan, and Cuba, Missouri, and unsuccessfully sought to enter Daniel Construction Pipefitters School. In addition, throughout the four-quarter backpay period, on a biweekly basis, he visited the Missouri State Unemployment office and sought employment through it with the officials reviewing their employment opportunity cards in his presence.

In the period January through March 1982, he drove to St. Louis twice a week and sought employment through the Painters Union office, checked with major painting contractors and sought work as a busdriver with six small bus companies in Missouri.

About March 23, 1982, and for the succeeding 5 weeks, he was employed in St. Louis by Joseph Ward Painting Company and worked there continuously until the job ended at the end of 5 weeks. Prior to obtaining the job at Joseph Ward, he sought work through the painting contractor at the Daniel Calloway job but, after telephoning the Jefferson City, Missouri Painters local, and seeking work through it, no work was ever forthcoming at that site.

During May 1982, after termination of the Ward job, Jones again commuted to St. Louis looking for work but was unable to find work until June when he was employed as a painter by Coatings Unlimited on June 3, 1982. He has worked for Coatings Unlimited from that date through the time of the hearing and the General Counsel concedes this constitutes permanent employment.

The record also shows that during the backpay period, while Jones did not register at the Boilermakers exclusive hiring hall, he did telephone its dispatcher and was told that there was no work available for him.

Respondent failed to introduce evidence in support of its assertion that Jones failed to exercise reasonable efforts to secure interim employment and, inferentially, that he engaged in willful idleness. As noted in *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 545 (1978), the burden is on Respondent to establish its affirmative defenses including the obligation to show that Jones did not make a bona fide effort to seek employment, *Aircraft Leasing*, 227 NLRB 644, 646 (1976); *Westin Hotel*, 267 NLRB 244 (1983). This Respondent burden is not met by presenting evidence of a lack of employee success in getting interim employment or low interim earnings; rather, Respondent must affirmatively demonstrate that the employee neglected to make a reasonable effort to find interim work. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966). The discriminatee must make only "reasonable efforts to mitigate the loss of income and not undertake the highest standard of diligence," *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422–423 (1st Cir. 1968). Here, the evidence shows that Jones made continuous efforts to gain interim employment, commencing in the very quarter in which Respondent caused Daniel to unlawfully terminate him, some efforts being successful and others being unsuccessful. Jones did all that the law requires: a good-faith effort, *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). In determining the reasonableness of Jones' effort, the employee's skills and qualifications must be taken into account, *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962). Thus here, Jones' efforts at gaining interim employment ran the full gamut: he exercised continuous efforts to return to his area of experience as a painter; he also tried to gain work as a tire repairman, to work in a gasoline station, as a busdriver, and he continuously reviewed with the Missouri unemployment compensation agents available work on a biweekly basis. These efforts, including trips to St. Louis on a biweekly basis to contact the Painters Union and the large painting contractors, together with undenied efforts in the backpay period at gaining boilermaker work with pipeline contractors in Oklahoma, Wyoming, and Texas demonstrate that throughout the backpay period, as noted, Jones did all that the law requires of him, a good-faith effort to find interim employment. I find that he did so. Thus, Respondent, particularly in its failure to introduce any evidence of Jones' failure to diligently seek interim employment, failed to support its affirmative burden of proving either Jones' failure to diligently seek interim employment or to show willful idleness. Jones, on this record, made diligent efforts to seek interim employment throughout the backpay period.

Jones' Self-Employment in the Third Quarter 1981

Respondent, in (2), above, argues, inter alia, against deduction of interest on a loan securing the purchase of a bus which Jones used in self-employment.

In late July 1981, Jones purchased a used bus for the business of transporting Daniel employees to and from points in Cuba, Missouri, to the Calloway, Missouri worksite. In consideration of this service which he rendered to a maximum of about 15 employees, Jones charged $3 to $6 per day, per round trip, for each such employee. The one-way distance between Cuba, Missouri, and the Calloway Construction site is approximately 85 miles. Operation of the truck service all in the third quarter 1981 began on August 1 and ended September 30, 1981. Operations ceased because of a number of circumstances including the fact that Daniel had changed the hours of its work shifts working at Calloway making it impractical for Jones to continue the bus operation. In any event, on October 30, 1981 (i.e., in the fourth quarter of 1981), Jones sold the bus, incurring a $6050 loss on the sale.

It is also undisputed that Jones paid a total of $1855 in August, September, and October 1981, as interest on the debt incurred in the purchase of the truck. The payments were of equal amount and were paid in each such month.

Late in the hearing, the parties stipulated that, regardless of testimony previously appearing in the record and regardless of the allegations and assertions in the backpay specification and Respondent's answer, Jones' gross revenue from the operation of the bus transit company (Eagle Claw Transit Co.) in the single quarter of its op-

erations, the third quarter of 1981, was $8503. It was also undisputed that there could be deducted as expenses in the operation of this bus service the sum of $6307, thus resulting in net interim earnings in the third quarter of 1981 of $2196. Thereafter, the parties having ascertained that Jones' payment of interest on the loan for the bus for October 1981 fell outside the third quarter of 1981, it was agreed that approximately one-third of the $1855 total of interest payments be excluded from this deduction from net interim earnings. It was agreed that this figure be $615. Thus, the parties agreed to add to the $2196 in net interim earnings the sum of $615, thereby arriving at the agreed-upon figure of $2811 as the *minimum* quarterly interim earnings.[3] Respondent argues, however, that the entire balance of the actual third-quarter interest on Jones' debt incurred in the purchase of the bus should also be eliminated, raising the interim earnings by an additional $1240 (i.e., the balance of the $1855 interest payments).

Respondent thus seeks to distinguish the ordinary and necessary repairs and operating supplies necessary to operate the bus (e.g., gasoline, oil, tires, etc.) from interest payments necessary to secure the purchase of the capital equipment, i.e., the bus, which forms the basis of the self-employment itself. I do not accept this distinction.

If it is true that, as in *Heinrich Motors v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968), self-employment should be treated like any other interim employment in measuring backpay liability and that, as in *Mastro Plastics Corp.*, supra at 1350, only the net profits from self-employment ought to be included as interim earnings, then it would appear that Respondent must take Jones' bus interest payments, along with the other admittedly proper deductions from operating revenues (gasoline, oil, etc.) as a necessary element in the establishment of "net profits" in the determination of self-employment net interim earnings. I see no difference in the establishment of net profits between tires and gasoline on the one hand, and interest payments on the other. Interest on loans is necessary in the perpetuation of a business where the capital machinery cannot be acquired to permit self-employment except by way of making a loan to obtain the purchase of the machinery and paying interest thereon. No extended analysis is necessary to see that whereas tires and gasoline constitute an ordinary operational necessity, interest payments on the underlying capitalized debt constitutes an ordinary financial necessity in the continued running of the business. I therefore reject Respondent's distinction and conclude that the interest payments of $1240 (a total of $1855 less the agreed-upon $615, excludible as non-third quarter interest payment) should be included as proper deductions from gross interim earnings, thereby leaving third quarter 1981 net interim earnings of $2811. The payment of interest on the loan for the purchase price of the bus, being an "ordinary and necessary expense" of the business, should be deducted from interim earnings. See *Kansas Refined Helium Co.*, 252 NLRB 1156, 1161 (1980).

[3] This $2811 in third quarter 1981 interim earnings, is thus $1917 more than the $894 originally pleaded by the General Counsel as net third quarter interim earnings.

The General Counsel, in its turn, asserts that the $6050 loss incurred by Jones on the October 30, 1981 (fourth quarter) sale of the bus should be "attributed" to third quarter operations, thus leaving third quarter 1981 net interim earnings (which I have found to be $2811) to be actually zero.

In Board backpay proceedings, backpay is regularly computed on a quarterly basis. *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The calculation of gross and net backpay as well as interest on the calendar quarterly basis, established in *F. W. Woolworth Co.*, was approved in *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344 (1953); see *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977); *S. E. Nichols of Ohio*, 258 NLRB 1, 9 fn. 18 (1981), and particularly *Nelson Metal Fabricating*, 259 NLRB 1023 fn. 1 (1982). While the rule establishing the quarterly balancing of backpay against interim earnings was established to discourage a respondent employer's delay in offering reinstatement, it works to the advantage of the employee who, during part of the backpay period, may earn wages (whether from self-employment or otherwise) in excess of what he would have earned had he been working for the employer during the backpay period. While under *Nelson Metal Fabricating*, supra, the employer takes the risk that the employee will not, on a quarterly basis, earn sufficient wages from interim employment to offset the employer's backpay obligation in the particular quarter, yet the employer may not be held to accept the risk that the employee's self-employment operations, when concluded, will be used in such a way as to increase *deductions* from interim earnings from self-employment regardless of the quarterly basis. In short, if the employee accepts the benefits of the quarterly basis established in *F. W. Woolworth*, supra, he must also accept the obligation to so conduct his self-employment financial activities as to ensure, if he desires, the maximum deductions from interim earnings allowed.

In the instant case, Jones sold the truck in the fourth quarter while establishing interim earnings from self-employment in the third quarter. From Respondent's point of view, Jones might have retained the truck for a period of years or, indeed, indefinitely. Respondent may not, it seems to me, be required to bear the burden of waiting for Jones to dispose of the truck at Jones' later convenience and then be forced to accept the ensuing loss in the capital transaction reflected back to the operations of self-employment in the third quarter of 1981. Thus, I conclude that the Board's rules of accounting on a quarterly basis precluded the General Counsel's argument and prevents Jones from deducting the fourth quarter 1981 loss from the sale of the truck as against interim earnings of the third quarter of 1981. In view of this disposition, it is unnecessary for me to reach or analyze the merits of the more basic issue whether a capital loss resulting from self-employment operations is deductible from interim earnings resulting from self-employment *in*

the particular calendar quarter in which the earnings occur.[4]

Respondent's apparently principal argument, (3), above, is that the terminal date of the backpay period should be about March 23, 1982, when Jones took the painting job with Joseph Ward Painting Co. rather than on June 3, 1982, when he entered employment as a painter with Coatings Unlimited (where Jones has remained through the date of the hearing and the General Counsel concedes that Jones entered upon "substantially equivalent employment" and ended the backpay period).

Respondent produced no independent evidence to support this conclusion. Rather, it relies on the testimony of Jones himself on cross-examination. Jones testified that when he took the job with Joseph Ward Painting Company, he formed the idea that it would be a job of indefinite duration notwithstanding that the job thereafter lasted only 5 weeks. Jones had worked for Joseph Ward for a 6-year period prior to this time. He testified however that he neither told Ward that he expected the job to last indefinitely nor was told by Ward that the job would be of long, much less of indefinite, duration. On the other hand, Ward did not tell Jones that the job would be of short duration.

Respondent concedes that, as a commercial painter, Jones was part of the construction industry and that, in the construction industry, short term jobs are endemic.

I will assume, arguendo, that the subjective estimate of Jones in his taking the Joseph Ward job about March 23 amounts to a conclusion, if the job was permanent, to never return to Respondent's employ, I make this arguendo conclusion in the face of the facts that (1) Jones never testified that he would not return to Respondent's employ and (2) there is no independent evidence, whether from Jones' testimony or otherwise, of an assurance by Ward or a conclusion by Jones that this job was a permanent job whether or not Jones thought that it was of long duration. The cases are legion to support the proposition that the failure to retain interim employment does not necessarily terminate Respondent's obligation to pay backpay. See, e.g., *Big Three Industrial Gas*, supra; *S. E. Nichols of Ohio*, 258 NLRB 1; *J. S. Alberici Construction Co.*, 249 NLRB 751 (1980). Assuming, therefore, arguendo, that Jones' private and subjective belief that the Jospeh Ward job was of indefinite duration amounts to a private and subjective determination never to return to Respondent's employ, the Board rule is that, absent an offer or reinstatement, testimony as to subjective intentions does not establish any conscious or knowing waiver of the potential right to reinstatement. *Big Three Industrial Gas*, supra at 1203 and 1208. Moreover, even if Jones had made the statement that he did not intend to return to the Respondent's employ because of his employment at Joseph Ward, and that he would not accept an offer of reinstatement, the Board, nevertheless, has maintained a longstanding and continuing policy to "consistently . . . discount" employee's statements indicating unwillingness to accept reinstatement except when made in a formal, serious surrounding. See, particularly, *Big Three Industrial Gas*, supra at 1203 fn. 50, citing *Heinrich Motors*, 166 NLRB 783, 786 fn. 24 (1967), and its overruling of *English Freight Co.*, 67 NLRB 643 (1946); but cf. *International Business Systems*, 258 NLRB 181 fn. 4 (1981). In the instant case, Jones never admitted or asserted that he considered his employment at Joseph Ward commencing March 23 to be a permanent job or to constitute an abandonment of a right to reinstatement to the Daniel job. Rather, he manifested, at most, a subjective belief that the job at Joseph Ward was of indefinite duration. Under the circumstances and Board precedents, I conclude that Jones did not become employed in "substantially equivalent employment," at his 5-week job at Joseph Ward commencing March 23, 1982; rather, he engaged in a job of "substantially equivalent employment" only commencing June 6, 1982, at Coatings Unlimited.

Moreover, I believe that, especially in the construction industry, the conclusion that an unlawfully discharged employee is engaged only in interim employment rather than "substantially equivalent employment" can properly be viewed from hindsight. In any event, the burden of proof, to demonstrate that the Joseph Ward's job constituted "substantially equivalent employment" is on Respondent. The record is barren concerning the comparability of the Joseph Ward painting job to the Daniel boilermaker job or the Coatings Unlimted job. In such circumstances, it cannot be said that Respondent met that burden: to show substantial equivalency. *Teamsters Local 559 (Mashkin Freight Lines)*, 257 NLRB 24 (1981).

I therefore conclude that Respondent's argument that Jones entered upon substantially equivalent employment and abandoned and waived his right to further backpay in taking this 5-week job with Joseph Ward must be rejected.

Additions to Interim Earnings

During the course of the hearing, the parties stipulated that there be added to Jones' interim earnings for the first quarter of 1982 the sum of $83 by virtue of unreported interim earnings on a private paint job performed in Cuba, Missouri, about the beginning of March 1982. In addition, it was stipulated that with regard to the first quarter of 1982, $68 should be added to interim earnings by virtue of a diminution of deductions from interim earnings (private phone calls); and for the second quarter of 1982, interim earnings should be raised by $84.

In light of the above stipulations, and on the basis of stipulations relating to earnings from self-employment and deductions therefrom with regard to the third quarter of 1981, I find that Jones is entitled to backpay with interest as set forth below:

[4] To the extent that Respondent also argues that self-employment is tantamount to a withdrawal from the job market, the Board has ruled otherwise. See *Heinrich Motors v. NLRB*, 403 F.2d 145, 148; *Carter's Rental*, 250 NLRB 344 (1980). To the extent Respondent suggests that the cost of Jones' transportation from Cuba to St. Louis in his biweekly trips to seek work should not be awarded the status of deductibility from interim earnings in the quarter, the law is settled to the contrary. *Aircraft Leasing*, 227 NLRB 644 (1976). While there may well be a question as to whether the cost of the bus to Jones would be deductible, *Big Three Industrial Gas*, 263 NLRB 1189, 1208 (1982); *Aircraft Leasing*, supra, the General Counsel does not seek as a deduction the cost of the bus, but only the loss resulting from its resale. As above noted, the merits of the General Counsel's argument need not be reached.

The parties ultimately stipulated that the gross wages owed to Jones, pursuant to the backpay specification, was $26,533; and that the pension fund moneys which should be paid to trustees of the Boilermakers National Pension Fund on behalf of Jones, because of the discrimination against him, was $2072.

The above stipulation showing wages of $26,533 owed to Jones occurred before further evidence showed that interim earnings for the third quarter of 1981 were $2811 rather than the original $894. I shall add the difference ($1917) to the interim earnings for the third quarter of 1981.

I therefore make further deduction from gross backpay based on increased interim earnings in the third quarter of 1981 in the sum of $1917; and in view of the stipulations to add to interim earnings for the first quarter of 1982, the sums of $83 (paint job in Cuba, Missouri) and $68 (telephone calls); and for the second quarter 1982 the sum of $84 (telephone calls) I conclude that, with regard to net backpay, based on the parties' final stipulations, Respondent is obligated to Jones in the following respects: I deduct the figure of $2152 ($1917 plus $83, plus $68, plus $84) from the stipulated gross backpay of $26,533 with resulting net backpay (wages) of $24,381.

I also conclude, consistent with the stipulation, that $2072 be paid on behalf of Jones by Respondent to the Boilermakers National Pension Fund.

Both of the above sums shall be paid with the addition of interest as provided in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law on the entire record, I issue the following recommended[5]

ORDER

The Respondent, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers Local No. 27, its officers, agents, and representatives, shall make Paul Jones whole by payment to him of the sum of $24,381 less statutory withholdings but with interest as prescribed in *Florida Steel Corp.*, supra. Additionally, Respondent shall tender to Boilermakers National Pension Fund on behalf of Paul Jones' account the sum of $2072 with whatever interest is customary and usual in the cases of late payments to said fund, *Teamsters Local 559 (Mashkin Freight Lines)*, 257 NLRB 24, 26 except that in the event the fund, for any reason, refuses to accept such money within 60 days of a final order in this case, said sum of money shall be paid, with interest as prescribed in *Florida Steel Corp.*, supra, directly to Paul Jones. *Teamsters Local 559, supra at 26.*

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.